PUBLIC BANK BHD

v.

KEMAJUAN FLORA SDN BHD & ORS

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[SUIT NO: 22-17-1998]
14 JANUARY 2003

CIVIL PROCEDURE: *Amendment - Statement of claim - Principles applicable - Whether delay inordinate - Whether proposed amendments would introduce new cause of action - Rules of the High Court 1980, O. 20 r. 5*

This was an appeal by the plaintiff/bank to the judge-in-chambers from the decision of the registrar dismissing its application under O. 20 r. 5 of the Rules of the High Court 1980 for leave to amend its writ and original statement of claim. In dismissing the plaintiff's application, the registrar had accepted the defendants' contention that there was a substantial delay on the part of the plaintiff in making the application and that the proposed amendments would also introduce a new cause of action which would be different from the plaintiff's original cause of action.

Held:

[1] The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice will or will not result: (1) whether the application is *bona fide*; (2) whether any prejudice caused to the other side can be compensated by costs; and (3) whether the amendments will in effect turn the suit from one character into a suit of another and inconsistent character. (*Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191 followed.) (p 798 c-d)

[2] The nine-month delay on the part of the plaintiff in filing the application to amend its writ and statement of claim was **not** so inordinate as to seriously affect the merits of the application. (p 798 h)

[3] The amendments proposed by the plaintiff would **not** introduce a new cause of action. The amendments only sought to expand the plaintiff's original statement of claim to include all the essential facts resulting in the same monetary claim in order to place before the court the real question in controversy between the plaintiff and the defendants, and also to

particularise the facts and figures to reflect the rights and obligations of the respective parties with regard to the credit facilities and transactions existing between them. (pp 799 g-h & 800 b-c)

[Appeal allowed; order of registrar set aside; plaintiff granted leave to amend writ and statement of claim.]

Case(s) referred to:

Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 CA ***(refd)***

Angle Cake House Sdn Bhd & Ors v. Bandaraya Development Bhd [2001] 1 CLJ 746 HC ***(refd)***

Chau Anui v. Tan Kim Chai [2002] 5 CLJ 79 HC ***(refd)***

Gurbachan Singh & Ors v. Tetuan Muthu & Lee & Anor [2001] 2 CLJ 173 HC ***(refd)***

Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC ***(refd)***

Kam Hoy Trading v. Kam Fatt Tin Mine [1963] MLJ 248 ***(refd)***

Raphael Pura v. Insas Bhd & Anor [2000] 4 CLJ 830 CA ***(refd)***

Syarikat Ying Mui Sdn Bhd v. Muthusamy Sellapan And Other Appeals [1999] 4 CLJ 651 HC ***(refd)***

Taisho Company Sdn Bhd v. Pan Global Equities Bhd & Anor [1999] 1 CLJ 703 CA ***(refd)***

Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(foll)***

Yoong Leok Kee Corporation Sdn Bhd v. Chin Thong Thai [1981] 2 MLJ 21 FC ***(refd)***

Legislation referred to:

National Land Code, ss. 256, 257

Rules of the High Court 1980, O. 20 r. 5(1)

For the plaintiff - SS Yeo; M/s Philip Chua & Co

For the defendants - CK Lim; M/s Shareena Abdullah & Lim

Reported by Gan Peng Chiang

JUDGMENT

Low Hop Bing J:

Appeal

This is the plaintiff's appeal to me as judge in chambers against the decision of the learned registrar who had on 26 November 2001 dismissed the plaintiff's application in encl. (42) which was made under O. 20 r. 5 of the Rules of the High Court 1980 for leave to amend the writ and statement of claim ("the application").

Proposed Amendment

The effect of the proposed amendment is to reduce the amount of the plaintiff's claim against the defendants.

A complete and clear picture may be presented by reproducing the relevant paragraphs of the plaintiff's original statement of claim as follows:

> 3. Sebagai balasan Plaintif memberi kemudahan kredit kepada Defendan Pertama, Defendan Kedua dan Defendan Ketiga telah menjamin pembayaran kepada Plaintif semua wang yang kena dibayar kepada Plaintif oleh Defendan Pertama setakat tidak melebihi limit prinsipal RM1,000,000-00 untuk kemudahan Pinjaman Tetap dan RM2,600,000-00 untuk kemudahan Overdraft pada mana-mana satu masa termasuk semua faedah dan Iain-lain caj-caj bank di atasnya.
>
> 4. Dengan itu Plaintif telah memberi kemudahan kredit yang tersebut di atas kepada Defendan Pertama di mana mereka tidak akan berbuat demikian jikalau bukan kerana jaminan yang di beri oleh Defendan Kedua dan Defendan Ketiga.
>
> 5. Kemudahan kredit yang diberikan kena dibayar balik atas tuntutan berserta dengan faedah pada kadar 2% setahun atas Kadar Pinjaman Asas (BLR) Plaintif.
>
> 6. Pada 31hb Januari 1998 Defendan Pertama berhutang kepada Plaintif sebanyak RM3,712,858.97 di mana butir-butirnya seperti berikut:

Kemudahan	Jumlah yang dihutang	Faedah yang dikenakan
Overdraft	RM2,810,245.31	15.10%
Pinjaman Tetap	RM902,613.66	15.10%

> 7. Melalui surat bertarikh 6hb Januari 1998 Plaintif melalui peguamnya telah menuntut bayaran wang berjumlah RM2,759,614.27 untuk kemudahan overdraft dan RM904,879.25 untuk kemudahan pinjaman tetap daripada Defendan-Defendan tetapi Defendan-Defendan telah abai dan/atau enggan membayar jumlah yang dituntut.
>
> 8. Dengan ini Plaintif menuntut daripada Defendan-Defendan atau mana-mana satu daripada mereka:
>
> (i) RM2,810,245.31 untuk kemudahan Overdraft dan RM902,613.66 untuk kemudahan Pinjaman Tetap.
>
> (ii) Faedah seterusnya pada kadar 15.10% setahun dengan kiraan asas bulanan dari 1hb Februari 1998 hingga tarikh pembayaran atau penyelesaian penuh.

(iii) Kos.

(iv) Lain-lain perintah yang dianggapkan suai manfaat oleh Mahkamah yang mulia ini.

(My translation:

3. In consideration of the plaintiff giving credit facility to the first defendant, the second defendant and the third defendant have guaranteed payment to the plaintiff of all monies payable to the plaintiff by the first defendant not exceeding the principal limit of RM1,000,000 for fixed loan facility and RM2,600,000 for overdraft facility at any one time including all interest and other bank charges thereon.

4. Hence, the plaintiff has given the said credit facilities to the first defendant. which they would not have given if not for the guarantee given by the second defendant and the third defendant.

5. The credit facilities given were to be repaid on demand together with interest at 2% per annum above the plaintiff's base lending rate (BLR).

6. On 31 January 1998, the first defendant was indebted to the plaintiff in the sum of RM3,712,858.97 the particulars of which are as follows:

Facility	Total Amount of debt	Interest charged
Overdraft	RM2,810,245.31	15.10%
Fixed Loan	RM902,613.66	15.10%

7. *Vide* letter dated 6 January 1998, the plaintiff through its solicitors demanded payment from the defendants the sum of RM2,759,614.27 being overdraft facility and RM904,879.25 being fixed loan facility but the defendants have neglected and/or refused to pay the sums demanded.

8. Wherefore, the plaintiff claims from the defendants or any of them:

(i) RM2,810,245.31 being overdraft facility and RM902,613.66 being fixed loan facility;

(ii) Interest thereon at 15.10% per annum calculated on monthly rests from 1 February 1998 until date of payment or full realisation;

(iii) Costs;

(iv) Other orders deemed proper by this Honourable Court.)

The proposed amendment seeks to delete para. 3 to para. 7 above and to substitute therefor the following new paragraphs:

3. Atas permintaan Defendan Pertama Plaintif telah bersetuju memberi kemudahan pinjaman tetap sebanyak RM1,000,000.00 dan kemudahan Overdraft sebanyak RM2,600,000.00 (selepas ini pinjaman tetap dan kemudahan overdraft tersebut akan bersama-sama dirujuk sebagai "kemudahan kredit tersebut") kepada Defendan Pertama yang kena dibayar balik atas tuntutan berserta dengan faedah pada kadar 2% setahun atas Kadar Pinjaman Asas (BLR) Plaintif (selepas ini dikenali sebagai "Kadar ditetapkan") atau pada kadar lain yang akan ditentukan dari masa ke semasa oleh Plaintif menurut budibicra mutlak Plaintif. Faedah tambahan pada kadar 1% di atas Kadar ditetapkan akan dikenakan atas semua bayaran lewat atau tertunggak atau pada kadar lain yang akan ditentukan dari masa ke semasa oleh Plaintif menurut budibicra mutlak Plaintif.

4. Sebagai balasan Plaintif memberi kemudahan kredit tersebut kepada Defendan Pertama, Defendan Kedua dan Defendan Ketiga telah menjamin pembayaran kepada Plaintif semua wang yang kena dibayar kepada Plaintif oleh Defendan Pertama setakat tidak melebihi limit prinsipal RM3,600,000.00 sahaja termasuk semua faedah dan lain-lain caj-caj bank di atasnya.

5. Dengan itu Plaintif telah memberi kemudahan kredit yang tersebut di atas kepada Defendan Pertama di mana mereka tidak akan berbuat demikian jikalau bukan kerana jaminan yang di beri oleh Defendan Kedua dan Defendan Ketiga.

6. Selain daripada itu, Defendan Pertama telah melalui dua gadaian bertarikh 20.4.1995 dan didaftarkan dalam fail gadaian Pendaftar Hakmilik Tanah Melaka sebagai Jilid No. 481 Folio No. 12, Perserahan No. 2765/95 dan Jilid No. 481 Folio 13, Perserahan No. 2766/95 (selepas ini dirujuk sebagai "gadaian tersebut") menggadaikan kesemua tanah kepunyaan Defendan Pertama dikenali sebagai Lot 480 Geran No. Pendaftaran 5983, Lot 654 Geran No. Pendaftaran 12690 dan Lot 655 Geran No. Pendaftaran 12691, Mukim Parit Melana Daerah Alor Gajah, Melaka (selepas ini dirujuk sebagai "tanah-tanah tersebut") untuk menjamin pembayaran balik kemudahan kredit tersebut.

7. Defendan Pertama telah mungkir dalam pembayaran balik kemudahan kredit tersebut dan Plaintif telah mendapat perintah jual daripada Mahkamah Tinggi Melaka melalui Saman Pemula No. 24-90 tahun 1998 untuk menjual tanah-tanah tersebut secara lelong awam di bawah Seksyen 256 dan 257 Kanun Tanah Negara.

8. Tanah-tanah tersebut telah berjaya dijual melalui lelong awam pada 26.6.2000 dengan harga RM4,203,000.00.

9. Setelah lelong awam dijalankan dan disempurnakan masih terdapat kerugian selepas jualan yang dialami oleh Plaintif di mana butir-butirnya adalah seperti berikut:

Jumlah seperti pada 30-11-00	Overdraft	RM3,979,155.09
	Pinjman Tetap	RM1,148,715.62
		RM5,127,870.71
Campur: komisyen Mahkamah		RM 105,100.00
		RM5,232,970.71
Tolak: Jumlah lelong		RM4,203,000.00
Jumlah kekurangan dituntut		RM1,029,970.71

10. Plaintif telah melalui peguamnya mengeluarkan notis tuntutan bertarikh 13-1-2001 menuntut jumlah RM1,029,970.71 daripada Defendan-Defendan.

11. Walaubagaimanapun Defendan-Defendan masih gagal atau enggan membayar jumlah tersebut atau sebahagian daripadanya kepada Plaintif.

[My translation:

3. At the request of the first defendant, the plaintiff has agreed to give fixed loan facility of RM1,000,000 and overdraft facility of RM2,600,000 (hereinafter the fixed loan and overdraft facilities shall be collectively referred to as "the said facilities") to the first defendant which shall be paid on demand together with interest at 2% per annum above the base lending rate (BLR) (hereinafter known as "prescribed rate") or at such other rate as shall be prescribed from time to time by the plaintiff at the plaintiff's absolute discretion. Additional rate of 1% above the prescribed rate shall be imposed on all late payments or arrears or at such other rate as shall be prescribed from time to time by the plaintiff at the plaintiff's absolute discretion.

6. Apart from that, the first defendant has *vide* two charges dated 20 April 1995 and registered with the Registrar of Titles Melaka as Jilid No. 481 Folio 12, Presentation No. 2765/95 and Jilid No. 481 Folio 13, Presentation No. 2766/95 (hereinafter referred to as "the said charges") charging all the first defendant's land known as Lot 480 Registry Grant No. 5983, Lot 654, Registry Grant No. 12690 and Lot 655 Registry Grant No. 12691, Mukim of Parit Melana, District of Alor Gajah, Melaka (hereinafter referred to as "the said land") to secure the repayment of the said credit facilities.

7. The first defendant has defaulted in the repayment of the said credit facilities and the plaintiff has obtained an order for sale from the Melaka High Court *vide* Originating Summons No. 24-90-1998 to sell the said land by way of public auction under ss. 256 and 257 of the National Land Code.

8. The said land has been sold by way of public auction on 26 June 2000 at the price of RM4,203,000.

9. After the public auction has been executed and completed, there was a loss incurred by the plaintiff the particulars of which are as follows:

Total Amount as at 30.11.2000	Overdraft	RM3,979,155.09
	Fixed Loan	RM1,148,715.62
		RM5,127,870.71
Add: court commission		RM 105,100.00
		RM5,232,970.71
Less: amount from auction		RM4,203,000.00
Total Amount of Deficit claimed		RM1,029,970.71

10. Plaintiff through its solicitor issued a notice of demand dated 3 January 2001 claiming the sum of RM1,029,970.71 from the defendants.

11. Nevertheless, the defendants have failed or refused to pay the said sum or any part thereof to the plaintiff.)

There are also consequential re-numbering of the original paragraphs in the statement of claim and the updated figures in the original para. 8 pertaining to the amount and the interest claimed by the plaintiff.

Grounds Of Application

The application is said to be based on the grounds that the plaintiff has successfully auctioned the land charged to the plaintiff by way of security for the loan given to the first defendant wherein the second and third defendants were the guarantors and the plaintiff was said to have complied with the principles governing the granting of leave for amendment as enunciated by the Federal Court in *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428, and followed by the Court of Appeal in *Abdul Johari Abdul Rahman v. Lim How Chong & Ors.* [1997] 1 CLJ 361 and by the Supreme Court in *Hock Hua Bank Bhd. v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126.

Objection By Defendants

The defendants through learned counsel En. C.K. Lim objects to the application, principally on the ground that there was delay on the part of the plaintiff in making this application and that the proposed amendment is intended to introduce a new cause of action which is different from the original cause of action. This objection was upheld by the learned registrar.

In this appeal before me, a preliminary objection was raised that the notice of appeal in encl. (55) which was dated 5 November 2001 was premature as the decision of the learned registrar was delivered on 26 November 2001 and so the notice of appeal was defective.

Response By Plaintiff

In respect of the defendants' preliminary objection relating to the notice of appeal dated 5 November 2001, En. S.S. Yeo, learned counsel for the plaintiff submitted that it was an inadvertent typographical error which did not prejudice the defendants in any way, as the notice of appeal was filed on 5 December 2001.

In addition, it was submitted for the plaintiff that there was no delay in the plaintiff's application and that there was no new cause of action in the proposed amendment.

Decision On Appeal

Preliminary Issue

Although the date stated in the plaintiff's notice of appeal was obviously 5 November 2001 and before the date the learned registrar's decision was delivered, the receipt given by the court and imprinted on the said notice of appeal was actually dated 5 December 2001 and that provides the short answer to the preliminary objection raised for the defendants, as it was clearly an inadvertent mistake of the person preparing and vetting the notice of appeal in the office of the plaintiff's solicitors before it was filed in court and served on the defendants' solicitors. I shall treat it as a matter of triviality and apply the time-honoured maxim *de minimis non carat lex*.

Merits Of Appeal

(1) Governing Principles

Order 20 r. 5(1) of the Rules of the High Court 1980, where relevant, provides as follows:

> ... the Court may at any stage of the proceedings allow the plaintiff to amend his writ or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

The expression "at any stage of the proceedings" is certainly very wide, as has been demonstrated by the Federal Court in *Yoong Leak Kee Corporation Sdn. Bhd. v. Chin Thong Thai* [1981] 2 MLJ 21 which allowed an amendment even at the conclusion of the trial.

The established principles governing the granting of leave to amend a party's pleadings have been authoritatively enunciated by the Federal Court with unrivalled clarity in *Yamaha Motor Co Ltd., supra,* as follows:

> the general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (a) whether the application was *bona fide* (b) whether the prejudice caused to the other side can be compensated by costs and (c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

In the light of the objection raised for the defendants *viz.* delay in making the application and introduction of a new cause of action, I shall confine my judgment to these two issues.

(2) Delay

The test of delay may be illustrated through our decided cases.

In *Yamaha Motor, supra,* the Federal Court granted leave to the appellant to amend the statement of claim after pleadings were closed which did not constitute any delay. The amendment sought in that case had the effect (a) that the appellant would be suing not only in their capacity as judgment creditors but also as majority shareholders of the first respondent company and (b) that fraud or unlawful conspiracy would be pleaded expressly in the creation of the 1977 debenture instead of mere lack of consideration and security for a non-existent debt.

The delay, if any, raised in this appeal has been adequately explained in the plaintiff's affidvit in support to the effect that the auction was only carried out successfully on 26 June 2000, and the completion date on the certificate of sale was 90 days later. The application was made on 11 July 2001, in which case there was a lapse of nine months. In my view, this does cannot constitute such an inordinate delay as to seriously affect the merits of the application.

It is only in the case of an inordinate delay which is fatal to an application for leave to amend, as shown in the following cases.

In *Taisho Company Sendirian Berhad v. Pan Global Equities Berhad & Anor* [1999] 1 CLJ 703, the appellant only made an application to amend four years after the commencement of the action and after failing in his appeal to the Court of Appeal to dismiss the respondants' defence of limitation. The Court of Appeal upheld the judge's refusal for leave to amend as on the facts, the application borders on lack of *bona fide*.

An application to amend the defence which would convert the defence into an inconsistent defence of a different character, coupled with a long and inordinate delay of more than ten years, without providing any explanation for the delay, was held by Tee Ah Sing, J to be showing a lack of *bona fide* on the part of the defendant in *Angle Cake House Sdn Bhd & 7 Ors v. Bandaraya Development Berhad* [2001] 1 CLJ 746 HC.

Similarly the ground of substituting one cause of action with another by way of amendment and also a delay of some 12 years in applying for amendment ie, from the filing of the suit on 7 March 1983 to the date of the application on 26 September 1995 without any explanation, was held by Clement Skinner, JC (now J) to reflect the lack of *bona fide*: *Syarikat Ying Mui Sdn Bhd v. Muthusamy a/l Sellapan and Other Appeals* [1999] 4 CLJ 651 HC.

In *Gurbachan Singh & 2 Ors v. Tetuan Muthu & Lee & Anor* [2001] 2 CLJ 173, the plaintiff's three year delay in applying for amendment after a dissolution of injunction and removal of caveat was held by Su Geok Yiam JC as a belated manoeuvre designed to extricate themselves from the predicament and therefore casting serious doubts on the *bona fide* of the plaintiff in making the application.

An application for amendment in order to delay the trial of a defamation action was held to border on the lack of *bona fides*: *Raphael Pura v. Insas Berhad & Anor* [2000] 4 CLJ 830.

(3) New Cause Of Action

On the question of whether the proposed amendment has introduced a new cause of action, it is to be observed that the original statement claim has been considerably expanded to include all the essential facts resulting in the same monetary claim in order to place before the court the real question in controversy between the plaintiff and the defendants. Further, the proposed amendment has particularised the facts and figures to reflect the respective party's rights and obligations in the facilities and transactions existing between the parties herein. With respect, no new cause of action has been introduced in the proposed amendment. I am of the view that the learned registrar's finding that there was a new cause of action cannot be legally sustained.

(4) Judicial Discretion

While it is clear to me, that at the end of the day, the grant or refusal of leave to amend is to be determined by reference to the exercise of judicial discretion by the court depending on the circumstances of each case: *Raphael Pura, supra, Chau Anui v. Tan Kim Choi* [2002] 5 CLJ 79, nevertheless this discretion must be exercised judicially: *Kam Hoy Trading v. Kam Fatt Tin Mine* [1963] MLJ 248; *Chau Anui, supra*.

In my view, a party such as the plaintiff should not be denied leave to amend its writ and statement of claim as alluded to above in order to include detailed and updated facts, figures and particulars in the pleadings so as to enable the real issues between the parties to be tried and determined: See *Hock Hua Bank, supra; Abdul Johari, supra.*

It is trite law that at this stage, I am not the least concerned as to whether the proposed amendment would result in the success or otherwise of the plaintiff in these proceedings. See *Yamaha Motor, supra.*

(5) Conclusion

In the light of the aforesaid grounds, I hereby allow this appeal, set aside the said order of the learned registrar and hereby grant leave to the plaintiff to amend the writ and statement of claim as in encl. (42). The prejudice, if any, to the defendants may be compensated by an award of combined costs, before the learned registrar and in this appeal, of RM2,000 to all the defendants, and I hereby so order.

The defendants are also given leave to amend the defence, if the defendants are inclined to do so, within 14 days after the service of the plaintiff's amended writ and statement of claim on the defendants.